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Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1071~~ 1176

SUNRISE LUMBER & TRIM CORP.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Sunrise Lumber & Trim Corp. respectfully prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered March 11, 1957, enforcing against your petitioner an order of the National Labor Relations Board, dated March 21, 1956, insofar as the decree directs the Petitioner to bargain collectively with Local 282 of the International Brotherhood of Teamsters and to reinstate four former employees with back pay.

Citations to Opinions Below

The Intermediate Report of the Trial Examiner is unreported and is printed in "Appendix to Petitioner's Brief" in the Court of Appeals* at page 158.

*Hereinafter cited as "Board's Appendix" or "B. A."

The opinion of the National Labor Relations Board is reported, as part of its Decision and Order at 115 N. L. R. B. No. 127 (1956) and is also printed in the record below at B. A. page 190. The opinion of the Court of Appeals appears at 240 F. 2d 620 and, together with the Decree sought to be enforced, have been reproduced as appendices hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 62 Stat. 928; 28 U. S. C. Section 1254 (1).

Questions Presented

1. May The National Labor Relations Board Under Section 10 Of The National Labor Relations Act (As Amended) In An Unfair Labor Practice Proceeding Resulting From A Charge Filed By A Union Direct An Employer To Bargain With Said Union After Said Union First Filed A Petition For Certification Under Section 9 Of Said Act And Later Withdraw Said Petition?

2. May The National Labor Relations Board Direct An Employer To Bargain With A Union And To Offer Reinstatement With Back-Pay To Employees Who Went On Strike To Secure The Union's Demand For A Contract Containing An Unlawful Union Security Clause?

Statutes Involved

As to question 1, the statutory provision involved is Section 9 of the National Labor Relations Act as amended 61 Stat. 136, 140 29 U. S. C. (Secs. 151,

158 (d)), particularly Section 9 (c) (1), the text of which follows:

"Representatives and Elections"

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

As to question 2, the statutory provision involved is Section 8 (a) (3) of the said Act. The text is as follows:

"Unfair Labor Practices"

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-

membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Statement

The Petitioner operates a country lumber yard in Massapequa, New York. On March 19, 1955, at a time when the Petitioner employed 14 full time and 6 regular part-time workers, Petitioner's president, Francis Tursi was approached by John Cody, a business agent of Local 282 of the Teamsters Union.

Cody told Tursi that he was there "to represent the men, and try to organize his (Tursi's) business" (B. A. 25). Tursi asked to see the six designation cards which Cody claimed to have but Cody refused to let him look at them (B. A. 25).

Heated words were exchanged and Tursi ordered Cody off his property. Before he left, Cody took a contract out of his pocket. He testified with respect thereto as follows: "I said, 'This is the thing we are looking for,' and he (Tursi) says, 'You better give that to my lawyer.'" (B. A. 25).

On March 24, 1955, the Union filed with the Second Region of the National Labor Relations Board a petition for an election. The unit requested being described as "Chauffeurs and Yardman, excluding foremen and millworkers" (B. A. 148).

On April 5, 1955, a joint conference on the petition was had at the Labor Board's office, in accordance with its practise, but the parties were unable to agree on the appropriateness of the unit. The Board scheduled a representation hearing for April 27, 1955. This hearing was postponed several times until on June 10, 1955, the Union filed a request to withdraw the petition, which request was approved by order of the Regional Director on June 14, 1955 (B. A. 148, 149).

Previously, on May 25, 1955 the union had filed the unfair labor practice charge and on June 13, 1955 filed a first amended charge (B. A. 1). Meanwhile, on March 25, 1955, Cody again appeared at the Petitioner's place of business and, with six of petitioner's employees, gave Tursi the standard form of Union agreement with a "sign or else" ultimatum.

That contract contains the following requirement:—

> "Members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (A. F. of L.) to be employed when available, otherwise those who will become members of Local 282 at its next meeting." (B. A. 153)

The six employees went on strike soon thereafter, but not before Tursi asked for and received permis-

sion from Cody to talk to the men (B. A. 31, 38, 152, 153).

Several days after the strike began, two of the employees asked to come back to work and were permitted to do so (B. A. 155). The other four picketed for several weeks, never made a request for re-employment until June 9, 1955 when counsel for the Union made a demand for their reinstatement. The demand, incidentally, included the name of one of the employees who had long since returned to work (B. A. 11, 12).

Unfair labor practice charges were prosecuted by the Board. The Order of the Board directed the Petitioner to bargain with Local 282, offer reinstatement to four employees with back pay and cease and desist from certain conduct found to be violative of the Act.

The Court of Appeals for the Second Circuit reviewed on petition by the National Labor Relations Board for enforcement under Section 10 (e) of the National Labor Relations Act, the petitioners being engaged in business within that circuit.

The Court below sustained the Board in all respects.

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance concerning the construction, intent, purpose, policy and administration of The National Labor Relations Act, as amended, with respect to which, in so far as counsel for the petitioner are informed, this Court has not passed judgment.

A With Respect to Question One

The Board, having approved the withdrawal by the union of a petition filed by the union for the determination of an appropriate unit and for an election under Section 9 of the Act, lacked power thereafter to determine the appropriate unit or the union's representative status in a proceeding under Section 10 of the Act and consequently the Board's determination is defective.

The power of the Board to determine the appropriate unit and the Union's representative status in a proceeding under Section 10, in the facts of this case, is not to be found in the Taft-Hartley Act. Its power to make such determination is strictly limited to a proceeding under Section 9. A comparison of the language used in the original Act and the Act as amended shows beyond question that such was the Congressional intent.

Thus, Section 9 (c) of the original (Wagner) Act provided, among other things:

> "* * * In such investigation the Board shall provide for an appropriate hearing upon due notice, *either in conjunction with a proceeding under Section 10 of this title or otherwise*, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representatives." (Emphasis supplied.)

That procedure was changed, however, by the amendment of Section 9 (c) which now provides, among other things, that:

> "* * * The Board * * * shall provide for an ap-

propriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it *shall* direct an election by secret ballot and shall certify the results thereof." (Emphasis supplied.)

By deleting the enabling words "either in conjunction with a proceeding under Section 10 of this title or otherwise" from Section 9 (c) of the Wagner Act, and by providing in the place and stead thereof that the Board shall provide for an appropriate hearing upon due notice and shall direct an election and certify the results thereof, Congress manifested its intent to confine the powers of the Board in such matters to a proceeding under Section 9.

This Congressional intent to provide for separate and distinct proceedings is further shown by the provisions of Section 9 (d) which provides, among other things, that:

"Whenever an order of the Board made pursuant to Section 10 (c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 10 (c) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall

be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

Nowhere in Section 10 of the Act is any language to be found authorizing the Board in a proceeding under that section to direct an employer to bargain with the union. Such a direction is equivalent to a certification under Section 9 of the Act.

By allowing the Union to withdraw its petition for a determination of the appropriate unit and for an election, the Board therefore divested itself of the power to make a determination as to the appropriate unit and the Union's representative status, and could not subsequently do so in a proceeding under Section 10.

If the Union's petition for a determination of the appropriate unit and for an election had not been withdrawn with the Board's approval, the Board might have consolidated the two proceedings (cf. Rules and Regulations, Series 6, Section 102.33; *National Labor Relations Board* v. *Dixie Shirt Co.*, 176 F. 2d 969 (C. A. 4). But when the petition was withdrawn with the Board's consent, there were no longer two proceedings pending and there could be no consolidation and no determination of the appropriate unit or the Union's representative status.

The respondent's position was grossly prejudiced by the Board's unwarranted procedure. It was deprived of a separate and distinct determination of the appropriate bargaining unit and the Union's representative status, uninfluenced and uncontaminated by the atmosphere of "unfair labor practice charges"

and its employees were deprived of their right under the Act freely to select their bargaining agent.

An examination of the chronology of events demonstrates that the Board's order to petitioner to bargain with the union awarded to the union a victory in an election which it requested but which was never held, covering employees who never designated the union as their bargaining agent. For all that appears, it may be that the union decided it could not win an election but would try to "get in" through an unfair labor practice charge. Here is the chronology of events: On June 10, 1955, the union filed its request to withdraw its petition for an election. On June 13, 1955 the union filed its amended unfair labor practice charge (B. A. 1) and on June 14, 1955 the Board approved the withdrawal of the union's petition, later convicted the employer of unfair labor practice charges and ordered it to bargain with the union, not under Section 9 but under Section 10 of the Act.

It is significant that, although throughout the hearing, the Board's Counsel had all of petitioner's employment records available, there is nothing in the record to show that a majority of the employees then in the employ of petitioner had signed cards for or designated this union to represent them. On the contrary, the record discloses that none of the six employees who so designated the union were in the employ of petitioner at the time of the hearing and as appears from the opinion of the Court of Appeals the two who had come back to work left their employment in May and June, 1955. The conclusion would follow therefor that if the petitioner is required to bargain with the union it would be bargaining for

employees who never designated or voted for this union. It is submitted that such a result, instead of effectuating the policies of the Act, would violate the fundamental policy of the Act, which is to permit employees freely to select their representatives for purposes of collective bargaining.

B With Respect to Question Two

The requirement in the standard Union agreement presented to and demanded of Petitioner that only members of the Union be employed calls for a closed shop, in violation of Section 8 (a) (3) of the Act.

While the contract contains what purports to be a "saving clause", that clause cannot be relied upon to remove the taint of illegality for the reason that the designation cards of the Union specifically authorizes a closed shop as the basis for Union representation. It reads as follows:

> "I, the undersigned employee of the Sunrise Lumber Co. hereby authorize the Drivers & Chauffeurs Union, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, affiliated with the American Federation of Labor, to make an agreement with my employer, requiring membership in said labor organization as a condition of employment" (B. A. 10).

Since one, if not the principal, purpose of the strike was to force the petitioner to violate the Act, the strikers could not, perforce, be unfair labor practise strikers no direction to rehire with back pay could legally issue and petitioner could not legally be directed to bargain with the union.

It appears from the testimony that the employees who went on strike did so to get the contract presented to Tursi which they had all read and which set forth what they were going to get if they went into the union (B. A. 32, 87). They decided to stick with the union 100% and when Tursi refused to sign the contract they started to picket (B. A. 88).

The National Labor Relations Board, itself, has held that where employees strike for an unlawful union-security contract, employees participating therein are deemed to have forfeited their rights to protection under the Act and may be denied reinstatement. *Mackay Radio & Telegraph Co.*, 96 N. L. R. B. 740. The Board has, likewise, ruled that where a Union insists upon an unlawful union security clause, it will be deemed to have refused to bargain, in violation of 8 (b) (3) of the Act. *National Maritime Union*, 82 N. L. R. B. 1365; *American Radio Association*, 82 N. L. R. B. 1344; *National Maritime Union*, 78 N. L. R. B. 971.

The United States Circuit Court of Appeals for the Second Circuit enforced the Board's Order in *N. L. R. B.* v. *National Maritime Union*, 175 F. 2d 686, holding that insistence upon an illegal union security provision amounts to an "attempt to discriminate" even though no actual instance of discrimination can be shown.

The United States Court of Appeals for the Seventh Circuit has also had occasion to rule, in the case of *American Newspaper Publishers Assn.* v. *N. L. R. B.*, 193 F. 2d 782, that insistence upon closed shop conditions is an unlawful refusal to bargain.

Whether the National Labor Relations Board may, in the light of the amendment to Section 9 (c) of the Act, direct an employer to bargain in a proceeding under Section 10 of the Act, and whether the Board may direct the same employer to bargain when the Union with which it is directed to bargain has struck in support of unlawful contract demands are important questions of Federal Law which have not been, but should be settled by this Court.

It is submitted that the observation in the opinion of the Circuit Court to the effect that the union's demand for a closed shop was a matter to be resolved in the bargaining process and not an excuse for refusing to bargain at all, begs the very question at issue. It is clear from the contract demanded and from the designation cards signed by the six employees that the union refused to bargain and had no intention of bargaining on the issue of the closed shop, or any other issue, because the employees stated they were for the union's demands 100% (which, of course, included the demand for a closed shop) and they removed all possibility of bargaining when they struck to obtain the contract presented. Accordingly, they were either striking for a closed shop or economic demands, or both and hence were not entitled to reinstatement or back pay and the employer had no further duty to bargain.

CONCLUSION

The writ should run with respect to both questions presented.

Respectfully submitted,

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Counsel for Petitioner

Dated: New York, N. Y.
June 7, 1957

APPENDIX A

Decree Sought to Be Enforced

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SUNRISE LUMBER & TRIM CORP.,

Respondent.

DECREE ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Clark, Chief Judge, and Lumbard and Waterman, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated March 21, 1956. The Court heard argument of respective counsel on January 9, 1957, and on February 18, 1957, being fully advised in the premises, handed down its decision enforcing said order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, Sunrise Lumber & Trim Corp., Massapequa, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Local 282,

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of the employees in the unit found appropriate in the Intermediate Report of the Trial Examiner of the National Labor Relations Board, dated December 15, 1955, with respect to rates of pay, wages, hours of employment and other conditions of employment:

(b) Discouraging membership in Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization of employees, by refusing to reinstate any of its employees because of their union membership or activity, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(c) Offering its employees wage increases and other improved working conditions for the purpose of undermining their union activities;

(d) Soliciting its employees to discontinue protected concerted activities; and

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act, as amended (hereinafter called the Act).

2. Take the following affirmative action, which the Board has found will effectuate the policies of the Act: –

(a) Upon request, bargain collectively with Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, as the exclusive representative of all the employees in the aforesaid appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement;

(b) Offer to Sylvestro Casillo, John Honer, Alexander Petrillo, and George Stephan immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, in the manner set forth in the section of the aforementioned Intermediate Report entitled "The remedy";

(c) Make whole each of the employees specified in the paragraph above, in the manner set forth in the section of the aforementioned Intermediate Report entitled "The remedy," for any loss of pay he may have suffered as a result of the Respondent's discrimination against him;

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying,

all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of back pay due and the rights to reinstatement under the terms of this Decree;

(e) Post in conspicuous places in its plant at Massapequa, New York, including places where notices to employees are customarily posted, copies of the notice attached hereto and marked Appendix. Copies of said notice, to be furnished by the Regional Director for the Second Region of the National Labor Relations Board, New York, New York, shall after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(f) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree what steps the Respondent has taken to comply herewith.

J. EDWARD LUMBARD
Judge, United States Court of Appeals for the Second Circuit

STERRY R. WATERMAN
Judge, United States Court of Appeals for the Second Circuit

FILED: MARCH 11, 1957

Appendix A

Appendix

Notice to All Employees Pursuant to

A Decree of the United States Court of Appeals, Enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

We will not discourage membership in Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization of our employees, by refusing to reinstate any of our employees because of their union membership or activity, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of their employment.

We will not offer our employees wage increases or other improved working conditions for the purpose of undermining their union activities.

We will not solicit our employees to discontinue protected concerted activities.

We will not in any other manner interfere with, restrain or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization, to

bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, except to the extent that such right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, as the exclusive representative of all employees in the following bargaining unit with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All truck drivers and yardmen.

WE WILL OFFER to the employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights or privileges, and make them whole for any loss of pay suffered as a result of our refusal to reinstate them.

Sylvestro Casillo
John Honer
Alexander Petrillo
George Stephan

Appendix A

All our employees are free to become or remain, or to refrain from becoming or remaining, members in good standing of the above-named union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the National Labor Relations Act.

SUNRISE LUMBER & TRIM CORP.
(Employer)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Opinion of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 115—October Term, 1956.

(Argued January 9, 1957 Decided February 18, 1957.)

Docket No. 24222

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

SUNRISE LUMBER & TRIM CORP.,
Respondent.

Before:

CLARK, *Chief Judge*,
LUMBARD and WATERMAN, *Circuit Judges*.

Petition by NLRB to enforce its order pursuant to decision against the respondent, reported at 115 N. L. R. B. No. 127 (1956). Petition granted.

THEOPHIL C. KAMMHOLZ, General Counsel, MARCEL MALLET-PREVOST, Asst. General Counsel; SAMUEL M. SINGER, NANCY M. SHERMAN, Attorneys, National Labor Relations Board, for Petitioner.

Appendix B

Joseph T. King, Alexander Eltman, New York City, for Respondent.

Waterman, *Circuit Judge:*

The National Relations Board petitions for enforcement of its order, reported at 115 N. L. R. B. No. 127 (1956), issued against the respondent, Sunrise Lumber & Trim Corp.

The facts relevant to our decision, as found by the Trial Examiner and adopted by the Board, are as follows: The respondent maintains its office and place of business at Massapequa, New York, where it is engaged in the manufacture and sale of lumber, milled products, building supplies, and related products. On March 18, 1955, three of the respondent's truckdrivers met with John Cody, the business agent of Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and signed cards that authorized the union to enter into an agreement with the respondent "requiring membership (in the union) as a condition of employment." On March 19 two more employees of respondent, another truckdriver and a yardman, signed similar cards. Also on that day Cody visited the respondent's mill and talked with Francis J. Tursi, the respondent's president. Cody and Tursi, who both testified at the Board hearings, differed vehemently in their recollections of this conversation, but the Trial Examiner adopted the former's version.

According to Cody's testimony, Cody told Tursi that he was at the mill for the purpose of representing the employees and that he was going to "try to

organize his business." Tursi asked which employees Cody was "going to organize," whereupon Cody said "the truckdrivers and one yardman." Tursi then asked Cody if he had any authorization cards. Cody answered that he had six, although only five had been signed at the time. Cody refused to let Tursi inspect the cards, but offered him a printed form contract, explaining that it "was what we (the union) are asking for." Tursi first told Cody to give the form contract to his lawyer, whom he did not identify. He then announced that it "was against his religion to be unionized," and ordered Cody off the mill premises.

On March 23 another of respondent's truckdrivers signed a union authorization card. The next day the union filed with the Regional Director a petition for a representation election, alleging that the appropriate bargaining unit consisted of the respondent's "chauffeurs and yardman."

On March 25 Cody visited the mill and talked to the six employees who had signed cards. They told Cody that they would strike, if necessary, in order to obtain recognition of the union. Cody informed Tursi of the decision. Tursi took the six employees into his office, where he discussed their grievances outside of Cody's presence. Three of the employees testified that Tursi made several offers of wage increases and other benefits conditioned upon the employees' disavowal of the union. The men rejected these offers, saying that they would not give up representation in the union. Once again Tursi replied that it was "against his religion" to have a union in the mill. The men returned to where Cody was waiting, received strike placards from him, and began picketing.

Shortly after the strike began, Tursi and Francis Ruiz, a foreman in respondent's mill, approached the employees on the picket line: Ruiz told the strikers that they were "damn fools" for not accepting Tursi's offers, and Tursi said that he would sell his own trucks and rent others before he would recognize the union. Within the next few days Tursi spoke to two of the strikers while they were picketing and offered them $25 each if they would unload a freight car. They both refused. A few days later Tursi told one of the striking employees that Tursi would make arrangements for him to install fences, sold by the company if he would buy a small truck necessary for the job. This offer was rejected.

On or about April 1 and 18, two of the strikers requested, and received, reinstatement. In May and June these two ceased work under circumstances that are not disclosed in the record and that are not alleged to have been unfair labor practices. On June 10 the attorney for the union wrote to the respondent demanding reinstatement of five employees, the four remaining strikers and one of the two who had been reinstated but whose employment had been severed before that date. On June 19th, the respondent's attorney wrote, in reply, that he would be "pleased to discuss" the demand. On June 22 the union attorney tried unsuccessfully to reach the respondent's attorney by telephone, and a day or two afterwards the latter attempted to return the call with a similar lack of success. This pattern, interrupted by the union attorney's vacation, was repeated several times during the summer of 1955. No further correspondence ensued, and the four remaining strikers were not offered reinstatement.

On these facts, the Trial Examiner found that the respondent had violated section 8 (a) (5) of the National Labor Relations Act, 29 U. S. C. A. paragraph 158 (a) (5), by refusing to bargain with the representative of the majority of its employees in an appropriate bargaining unit. In addition, respondent was found to have violated both sections 8 (a) (3) and 8 (a) (1) by discriminating against employees on the basis of union membership and by discouraging membership in a labor organization. The Board adopted the Trial Examiner's findings, and ordered the respondent to cease and desist from refusing to bargain with Local 282 and from interfering with the employees in the exercise of their rights under section 7 of the National Labor Relations Act, 29 U. S. C. A. paragraph 157. Affirmatively, the Board ordered the respondent to offer reinstatement with back pay to the four remaining strikers.

The respondent argues, inter alia, that it did not refuse to bargain with a representative of its employees because Local 282 never represented a majority of its employees in any appropriate bargaining unit. This argument is based on two contentions: (1) the Board incorrectly determined that an appropriate bargaining unit was comprised of eight employees who drove trucks and one yardman; (2) even if a unit so constituted was appropriate, Cody had indicated that his union was trying to organize the entire mill and therefore Tursi was justified in believing that the contemplated unit was not restricted to the truckdrivers and the yardman. We cannot accept either basis for this argument.

Appendix B

The Trial Examiner considered in great detail the duties, hours, and wages of the respondent's employees before concluding that an appropriate unit was composed of eight truckdrivers and one yardman. Cf. *Barton-Lingo Co.*, 91 N. L. R. B. 5 (1950). It rejected the union's contention that the six strikers alone constituted an appropriate unit, as well as the company's claim that nine more employees should have been included for an overall total of twenty. The Trial Examiner excluded others from the unit because of the part-time nature of their employment, the varying functions they performed, of their supervisor status in the operating of the mill. Of necessity, in a small organization such as that of respondent many of the employees perform overlapping functions. But we recognize the discretion that must be accorded to the Board in determing the appropriateness of a collective bargaining unit, and thus we will uphold such a determination unless it is "unreasonable and arbitrary." *Packard Motor Car Co.* v. *L. R. B.*, 330 U. S. 485, 491 (1947). There is no indication that the determination here was arbitrary or that it was motivated by improper considerations.

The respondent also argues that the Board was not empowered to determine the appropriate unit in this unfair labor practice proceeding, because it had previously approved the withdgawal by the union of its petition for a representation election. This position is wholly untenable, however, because it is the duty of an employer to bargain with the majority representative of its employees, whether or not that representative has been certified. See *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62.

71-72 (1956); *N. L. R. B.* v. *Dahlstrom Metallic Door Co.*, 112 F. 2d 756, 757 (2d Cir. 1940). This rule applies even where, as here, the majority representative has filed a representation petition that it subsequently withdraws after the employer's refusal to bargain. *Spitzer Motor Sales, Inc.*, 102 N. L. R. B. 437, 439, 443 (1953) enforced, 211 F. 2d 235 (2d Cir. 1954). And, of necessity, the Board must frequently determine the appropriateness of an alleged bargaining unit in order to pass upon a charge that an employer has refused to bargain with the majority representative of that unit.

Nor is respondent justified in its contention that the union's demand was for a mill-wide bargaining unit. Although the content of Cody's initial conversation with Tursi was disputed by the witnesses, it was clear to Tursi by March 25, the date of the strike, that the union sought to represent only the truckdrivers and the yardman. At that time Tursi's refusal to bargain was unquestionably attributable to his anti-union sentiments, rather than to his doubts about the majority status of Local 282. Cf. *N. L. R. B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70, 73-74 (3d Cir. 1954).

The respondent also contends that the complaint should have been dismissed in its entirety because the union was demanding a closed shop provision that is illegal under the National Labor Relations Act. Assuming, arguendo, that the union was, in fact, demanding an illegal security clause, we hold that such a demand is a matter to be resolved in the bargaining process, not an excuse for refusing to bargain at all. *N. L. R. B.* v. *White Construction Co.*, 204 F. 2d 950, 953 (5th Cir. 1953). In addition, the

respondent argues that it was error to find a refusal to bargain with the union representative because Cody never offered to bargain; i. e., his demands were always couched in the form of an ultimatum. This contention must be readily dismissed, however, because there is substantial evidence in the record to support the Board's finding that Tursi's refusal to bargain with the union representative was motivated by his strong objection to unions and not by the particular terms of the printed form contract. This finding is further substantiated by Tursi's willingness to offer generous wage increases and other benefits to his employees on the condition that they would renounce the union.[1]

II

The respondent also urges that the Board erred in its finding that the striking employees were unfair labor practice strikers rather than economic strikers. The company claims that there was no support for its finding of violations of Sections 8(a)(1) and 8(a)(3). These contentions cannot be sustained, however. Three employees testified that at the closed meeting on March 25 Tursi was told that the employees would strike only if the company refused to bargain with their union representative. This testimony is

[1] An offer to raise wages conditioned on withdrawal from a union is evidence of a failure to bargain in good faith. *N. L. R. B.* v. *A. E. Nettleton Co.*, — F. 2d — (2d Cir. 1957), and negotiating directly with the employees without consulting their union representative constitutes a violation of paragraph 8(a)(1). See *May Department Stores* v. *N. L. R. B.*, 326 U. S. 376, 383-85 (1945).

reinforced by the strikers' rejection of the individual raise offers.

The respondent's actions clearly constituted a violation of Section 8 (a) (1), because it repeatedly attempted to interfere with the employees' rights under Section 7 of the Act. For example, it threatened to sell its own trucks and rent others, thereby abolishing the strikers' jobs. When such a step is motivated by a desire to interfere with the employees' rights under the Act, rather than by economic considerations, it constitutes a Section 8 (a) (1) violation. Cf. *N. L. R. B.* v. *Armstrong Tire & Rubber Co.*, 228 F. 2d 159 (5th Cir. 1955); *N. L. R. B.* v. *Nina Dye Works Co.*, 203 F. 2d 849 (3d Cir. 1953). In addition, the respondent violated both Sections 8 (a) (1) and 8 (a) (3) by failing to offer reinstatement to the strikers upon notice of such a request by the union attorney on June 10. The equivocal reply by the respondent's attorney was inadequate, because unfair labor practice strikers are entitled to reinstatement with back pay even if replacements for them have been made. *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 278 (1956). Once put on notice by the original request, the respondent was obligated to offer reinstatement to all the strikers and its duty was not discharged merely by reinstating some of them.

III

Lastly, the respondent claims that the Board improperly denied its motion to reopen the record for the purpose of permitting the respondent to submit additional, newly discovered evidence. The evidence

sought to be introduced consisted of police records allegedly indicating that Cody had been convicted three times for various offenses. The respondent contends that this evidence came to its attention only because of a newspaper article appearing after the Board proceedings, and that its admission is crucial in view of the weight placed by the Trial Examiner on Cody's testimony. But the Board's refusal to reopen these proceedings was not an abuse of discretion inasmuch as the new evidence bore only on credibility. It is well settled that "newly discovered evidence, the effect of which is merely to discredit, contradict or impeach a witness does not afford a basis for the granting of a new trial." *Davis v. Yellow Cab Co.*, 220 F. 2d 790, 792 (5th Cir. 1955); *see United States v. Johnson*, 142 F. 2d 588, 592 (7th Cir. 1944), cert. dismissed, 323 U. S. 806; *United States v. Rutkin*, 208 F. 2d 647, 654 (3d Cir. 1953). Cf. *Mesarosh v. United States*, 352 U. S. 1, 9 (1956). In any event, there was sufficient testimony from witnesses other than Cody to establish the unfair labor practices of the respondent.

Petition granted.